

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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WASHINGTON, D.C. 20554

Amendment to the Commission's Rules
Regarding a Plan for Sharing
the Costs of Microwave Relocation

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WT Docket No. 95-157
RM 8643

COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

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SUMMARY

Omnipoint generally supports the Commission's proposed plan for cost allocation among PCS providers of certain costs of relocating microwave incumbents. The plan, with certain modifications as detailed in the comments, treats all participants fairly -- PCS providers share in the cost of relocation and microwave incumbents receive a seamless transition to comparable facilities. On the mechanics of the plan, Omnipoint takes the following positions: (1) it supports a defined, ten year reimbursement period, as it helps all parties plan with certainty for the payment of the reimbursement obligations; (2) it supports the Commission's tentative conclusion that operators are obligated to pay the reimbursements only when they have initiated a commercial system that would have interfered with the microwave incumbent; (3) it supports PCIA's position on the application of the full reimbursement provisions; (4) it urges the Commission to narrowly define compensable costs to remove all forms of "premium payments" and it urges the Commission to try to curb abuses by microwave incumbents during the voluntary negotiation period.

Omnipoint fully supports the concept of reimbursement caps because they provide a measure of fairness to the subsequent PCS entrants, and especially the Block C entrepreneurs. Caps will also likely reduce the number of disputes to be settled by the clearinghouse, ADR, or the Commission.

Finally, Omnipoint supports the proposal to permit PCS "entrepreneurs" to pay their reimbursement obligations in installment payments under the same terms as the auction installment payment provisions. As a small-business "entrepreneur," Omnipoint requests that the Commission clarify that it also would be qualified to the installment payment plan with respect to microwave relocations and the Block A New York license operations.

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COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Omnipoint Communications, Inc. ("Omnipoint") files these comments in response to the Commission's Notice of Proposed Rulemaking, ("NPRM") in the above-captioned proceeding. Omnipoint generally supports the modifications of the incumbent microwave relocation rules and the cost-sharing plan between PCS operators suggested by the Commission. Omnipoint requests that the Commission further clarify that Omnipoint, as the Block A New York MTA licensee and as a recognized small business "entrepreneur," is eligible for the same reimbursement terms under the cost-sharing plan as any other broadband PCS small-business entrepreneur.

I. THE PROPOSED COST-SHARING MECHANISM IMPROVES THE CURRENT MICROWAVE RELOCATION PROCESS.

Omnipoint generally supports the cost-sharing mechanism proposed in the NPRM because it fairly allocates the costs of clearing the 2 GHz PCS spectrum, so that PCS operators can offer new services to the public expeditiously. Omnipoint and its affiliates have a unique PCS perspective on the issues in this docket as a Block A licensee for the New York MTA (call sign KNLF202), a small-business applicant in the upcoming PCS Block C entrepreneur's auction, and as a participant on the PCIA's Microwave Relocation Task Force. The cost allocation method proposed in the NPRM generally treats all parties in the process fairly, and it is reasonably straightforward to apply. Because it is generally fair and predictable, all participants can know what to expect from the microwave relocation process, which allows A and B licensees, as well as the prospective Block C licensees, to estimate their costs and design their

systems accordingly; it also maintains the microwave incumbent's assurance of a seamless transition to comparable facilities.

Importantly, the proposed cost allocation method resolves many outstanding problems with the current scheme. First, it addresses the "free rider" problem faced by PCS operators that are first to implement their systems. Under the current regime, the first entrants clearing an existing microwave link incur all the costs and yet other, competitive PCS operators in the same market also receive the benefit without paying the costs. This predicament will generally discourage first entrants from relocating microwave incumbents, which will slow the implementation of PCS. This result is, of course, contrary to Congressional directives and the Commission's fundamental policy objective of rapid deployment of PCS.¹

In addition, the proposed cost allocation scheme encourages more efficient, voluntary relocation of microwave systems, including microwave links outside the PCS relocater's market or licensed spectrum, by allowing the relocater to recover all of the allocated link relocation costs from the next PCS operator directly benefited by the relocation.² Omnipoint agrees that efficiencies can be gained by a relocation of an entire contiguous multi-link system (and not just the links in a particular PCS licensee's area) because it reduces the costs and time of negotiation for all participants.³ In contrast, the current regime does not provide a way for the PCS relocater

¹ See 47 U.S.C. 332(a)(3); Section 6002(d) of the Omnibus Budget Reconciliation Act of 1993; Memorandum Opinion and Order, 9 FCC Rcd. 4957, 4959 ¶ 4 (1994).

² Omnipoint agrees with the Commission's conclusion at ¶ 88 that it should not grant primary status to new microwave sites and facilities. Further licensing of incumbent microwave incumbents, including major amendments, can only complicate the renegotiation process and is contrary to the Commission's policy objective of transitioning the spectrum for new emerging technologies -- PCS. Memorandum Opinion and Order, 9 FCC Rcd. 1943 (1994).

³ However, Omnipoint does not believe that it is appropriate or efficient for the microwave incumbent to require that the PCS operator move several non-contiguous links in order for the incumbent to voluntarily consent to relocation of a single interfering link.

to recover a share of the costs of relocation from other PCS operators, even though those operators are benefited.

Finally, Omnipoint generally supports the proposed cost allocation scheme because it reasonably defines the appropriate costs of the relocation process, and facilitates expeditious negotiation.

II. REIMBURSEMENT OBLIGATIONS SHOULD BE CAREFULLY DEFINED TO PROVIDE CERTAINTY FOR ALL PARTICIPANTS.

Based on its review of the mechanics of the cost-sharing plan, as explained in ¶¶ 25 to 39 of the NPRM, Omnipoint offers the following comments:

A. Timing Issues:

Omnipoint supports the time frame suggested by the Commission at ¶¶ 31 and 39 of the NPRM whereby the T1 date would be set at April, 1995 and all payment obligations would cease in April, 2005. This defined time frame allows all participants to easily determine what the anticipated reimbursement obligations will be and when those obligations will end. Omnipoint also believes that it is fair to compensate parties for past relocation expenses incurred and that the easiest way to incorporate those past expenses is to start the reimbursement date at April, 1995 -- the date that the A and B licensee's relocation period officially commenced. By adopting a comprehensive reimbursement scheme which includes past expenses, the relocation negotiations and agreements that are ongoing can continue with the least disruption.

Finally, Omnipoint supports the Commission's tentative conclusion at ¶ 58 that the obligation to make reimbursement payments should commence only when the subsequent PCS operator begins a commercial, operational system that would have interfered with the relocated microwave link(s). While the PCS operator would have contacted the clearinghouse prior to the time of commercial operation to determine its total obligations under a proposed interference analysis, this potential obligation should not be incurred by the PCS operator until the system becomes operational.

B. Full Reimbursement Proposal:

Omnipoint supports the PCIA full reimbursement proposal outlined in ¶¶ 32 and 33 of the NPRM. Like the cost allocation formula for competing PCS licensees, the benefits of the full reimbursement proposal are its simplicity and its overall fairness. As Omnipoint understands it, full reimbursement would apply for the PCS operator that relocates a microwave link that is either (1) outside of its market area (both endpoints), or, (2) outside of its licensed frequency. The next PCS licensee that commences commercial service on the PCS spectrum that would have caused cochannel interference with the microwave link effectively takes over the role of the "PCS relocater" for reimbursement purposes among subsequent PCS operators also in that market. In addition, the new relocater pays full reimbursement for the first relocater's costs.⁴

Omnipoint does not believe that adjacent channel interference, discussed at ¶ 34 of the NPRM, should affect the full reimbursement provision. Adjacent channel interference is difficult to define and to ascertain in individual cases; therefore, it destroys the simplicity of the cochannel approach. In addition, there may be unfairness or room for abuse in requiring a PCS operator who relocates a link with alleged adjacent channel interference to assume the role of relocater, and pay a majority of the relocation costs, when all of the PCS market licensees that would have experienced direct, cochannel interference must pay less than one-half the reimbursement costs.

C. Compensable Costs:

Omnipoint strongly urges the Commission to limit the amount of compensable costs under the reimbursement scheme only to those costs justified to provide "comparable facilities" to the microwave incumbent. Compensable costs should not include any premium payments

⁴ Omnipoint requests that the Commission clarify that the full reimbursement cost is only the "compensable costs," subject to the reimbursement cap.

paid by the relocater to the microwave incumbent. As discussed below at section III, the relocater engaged in voluntary negotiations undoubtedly will have business incentives to offer the incumbent more than simple relocation costs in order to induce the incumbent to move quickly and voluntarily. The exorbitant offers by some microwave incumbents to A and B licensees, as described by PCIA, are testament to the fact that the spectrum is often more valuable in the hands of the PCS licensee and, so long as the voluntary negotiation period persists, some incumbents will attempt to reap a premium from the A and B licensees eager to become operational. However, the headstart effectively bought by the relocater through the premium payment should not be borne by the relocater's subsequent PCS competitors. The premium payment is a cost for the benefit of quick and voluntary relocation, which is enjoyed most directly by the relocater, not the subsequent entrants. Thus, it should be excluded from the compensable costs.

Further, the expenses included in "comparable facilities" should be narrowly tailored to avoid implicit premium payments calculated in the actual costs of the replacement facilities. For example, if the relocater upgrades the microwave incumbent's system while there were less expensive systems available at the time that would have met the "comparable facilities" criteria, the relocater should be entitled only to a compensable cost equal to the less expensive system. Otherwise, the relocater and the microwave incumbent could effectively hold subsequent PCS licensees responsible for premium payments through upgrade costs. With respect to mandatory relocation offers, the Commission has tentatively concluded that "the cost obligation of the PCS licensee would be the minimum cost the incumbent would incur if it sought to replace but not

upgrade its system." NPRM at ¶ 77. The Commission should clarify that the same "replacement cost" basis applies to reimbursement costs imposed from voluntary relocations.⁵

One way to limit the problems of exorbitant "compensable costs" is to assure from the outset of the process that the PCS relocater does not pay exorbitant costs during the voluntary renegotiation period. For example, the Commission could control costs by permitting the payment of equipment costs only, and exclude such items as consulting fees and additional cash payments. In Omnipoint's experience, not all of the microwave incumbents with which it negotiates are demanding exorbitant premiums; however, some microwave incumbents are attempting to use the transitional as means of cashing in on the promise of PCS, at the expense of the PCS operators and the public at large. For example, Suffolk County, NY has demanded that, in order to relocate its analog microwave links at 1850 to 1990 MHz, Omnipoint upgrade its entire system to digital, including all analog links at 2.1 GHz. In addition to the costs of the fully digital system, Suffolk County demands a \$18 million cash payment, described as a "revenue inducement" for relocation during the voluntary period. These demands are patently abusive of the Commission's transitional process.

III. REIMBURSEMENT CAPS ADD CERTAINTY, FAIRNESS TO THE COST-ALLOCATION PROCESS.

Omnipoint supports the concept of a cap of the amount of compensable costs that may be included in the reimbursement scheme. While the proposed scheme would not directly prohibit voluntary payments in excess of the caps, the caps will limit the reimbursement to the relocater, and thus, indirectly curb the abusive activities of some microwave incumbents, as described by

⁵ While the Commission concludes at ¶¶ 36 and 37 of the NPRM that the compensable costs shall be "the actual costs of relocating a microwave incumbent to comparable facilities," it does not explain that if the actual costs exceed the "comparable facilities" limits, those costs are to be excluded. *Cf.*, NPRM at ¶ 77.

PCIA and others. More importantly, the caps will directly limit the required reimbursement of the subsequent PCS operators that had no opportunity to participate in the negotiations between the microwave incumbent and the PCS relocater. In that way, it will protect subsequent PCS licensees from the negotiation decisions of the PCS relocater that benefit only the relocater. For example, if the relocater voluntarily decides to replace the microwave incumbent's system with an upgraded one, and avoid the delay of negotiating for a less expensive system, the cap roughly prevents subsequent PCS licensees from being forced to pay for that negotiating decision.

The reimbursement caps will foster the Commission's policy of encouraging new entrants into the wireless industry, and especially Block C entrepreneur-licensees. Providing these licensees with a measure of certainty as to their reimbursement expenses (with those costs capped at levels reasonably related to cost), greatly enhances their ability to set their build-out and deployment schedules, as well as meet financial or investor demands for cost estimates.

Moreover, because the Block C licenses are not likely to be issued prior to mid-1996, the A and B licensees will be the predominant PCS relocators. The voluntary price negotiated by these relocators, even as to expenses that may be deemed "comparable facilities," will inherently reflect the market advantage of the A or B licensees in initiating service prior to the effective entry of the Block C licensees; therefore, these PCS relocators are likely to avoid time-consuming negotiation over the replacement value of the incumbent's system and concede to microwave incumbent's demands for upgraded systems. Rather than placing the burden on the Block C licensee to litigate the issue of whether the compensable costs asserted exceed the "comparable facilities" cost, the cap is a method of avoiding disputes where costs are, *per se*, clearly not the cost of "comparable facilities."

Finally, by avoiding disputes in cases that exceed the cap levels, the administrative burden on the clearinghouse, the alternative dispute resolution process, and the Commission are reduced.

IV. OMNIPOINT SHOULD BE TREATED UNDER THE REIMBURSEMENT PLAN LIKE ALL OTHER SMALL BUSINESS ENTREPRENEURS.

Omnipoint supports the Commission's tentative conclusion at ¶ 61 of the NPRM that qualifying PCS entrepreneurs entitled to designated entity payment plan benefits "should have the same payment option available to them with respect to payments under the cost-sharing formula," and that " . . . the specific terms of the installment payment mechanism, including the treatment of principal and interest, would be the same as those applicable to the licensee's auction payments" ⁶ Omnipoint also supports the Commission's tentative conclusion that UTAM, because it receives funding incrementally over time and because it would have likely qualified as an eligible designated entity applicant, should be able to make reimbursement payments on the same terms as a designated entity small business. NPRM at ¶ 61.

Allowing small businesses an installment payment plan strengthens the Commission's overarching policy commitment, set forth by Congress, to foster legitimate and lasting small business participation in PCS.⁷ As the Commission pointed out in the Fifth Report and Order, 9 FCC Rcd. 5532, 5572-73 ¶ 96 (1994), "because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services." Because the A and B Block auction establishes such giants as

⁶ Omnipoint requests that the Commission clarify that a Block C "small business" licensee would be entitled to pay reimbursement costs to the PCS relocater with quarterly payments over ten years, interest-only for the first six years and principal and interest amortized over the last ten years, with the interest rate set at the ten-year treasury rate at the time it incurs the reimbursement obligation.

⁷ See 47 U.S.C. § 309(j)(4)(D); Sixth Report and Order, PP Dkt. No. 93-253, FCC 95-301, at ¶ 1 (released July 18, 1995).

AT&T, PCS PRIMECO, and WirelessCo as the major competitors to the "entrepreneur" entrant, it is even more critical at this time to allow the "entrepreneurs" to pay reimbursement costs over time in order that they can effectively compete in the market.

Given the Commission's approach to cost-sharing for Block C licensees and UTAM, Omnipoint and any other eligible "entrepreneur" or "small business" PCS pioneer should be entitled to equivalent treatment with respect to cost-sharing for operating its pioneer's license. Permitting Omnipoint to make its New York MTA reimbursement payments as a "small business" entrepreneur is consistent with the Commission's recent order setting going-forward rules for the treatment of pioneers.⁸ As adopted by the Commission, the pioneer's preference rules provide that "a pioneer that qualifies as a designated entity will be eligible for installment payments under the same terms and conditions as other designated entities *in that service . . .*" 47 C.F.R. § 1.402(g) (emphasis added).⁹ Further, in granting Omnipoint's license, the Commission noted that: "[t]he legislative history [of GATT] indicates that payment of the principal and interest [of Omnipoint's New York MTA license payment] should be 'in a manner consistent with the installment payment rules adopted by the Commission as part of its general competitive bidding regulations.'"¹⁰

⁸ "In the Matter of Review of the Pioneer's Preference Rules," Third Report and Order, FCC 95-218, ¶ 17 (released June 8, 1995).

⁹ Consistent with 47 U.S.C. § 309(j)(13)(C), the Commission limited the pioneer the length of "designated entity" treatment on the license payment to five years. However, in the context of reimbursement rights, there is no statutory or policy justification for allowing the "small business pioneer" any less than the full installment plan offered to "small business non-pioneers."

¹⁰ In the Matter of American Personal Communications, et al., Memorandum Opinion and Order, 10 FCC Rcd. 1101, 1102 (1994), *quoting*, H. Rep. No. 826, Part 2, 103d Cong., 2d Sess. 8 (1994).

Omnipoint qualifies as a small-business entrepreneur. The information offered in the initial Short-Form application of Omnipoint PCS Entrepreneurs, Inc. ("OPCSE"), which was accepted for filing by the Commission on November 20, 1995,¹¹ establishes that Omnipoint would qualify as a small business "entrepreneur." Therefore, the same policy concerns, such as lack of access to capital, which motivated the Commission to extend installment and other payment benefits to Block C small businesses apply with equal force to Omnipoint as a Block A licensee. Indeed, the case for lenient treatment for Omnipoint is even stronger in two respects. First, Omnipoint's MTA license may well require it to raise additional capital beyond that necessary for any BTA licensee. Second, the payment terms established under GATT, especially the two to five year installment term, make Omnipoint's license payments relatively more onerous than the Commission's generous 10 year installment plan offered to Block C licensees. Basic fairness and consistency with the Commission's commitment to promote entrepreneurs dictates that Omnipoint should be entitled to "small-business entrepreneur" status with regard to reimbursement payments in the New York MTA, as well as in any Block C license..

As an entrepreneur, Omnipoint's status as a Block A licensee, as opposed to a Block C or F licensee, is irrelevant to the issue of its entitlement to pay its reimbursement obligations in installments. Indeed, the Commission's tentative conclusion to provide UTAM with "small-business entrepreneur" status bears this out. Unlike Omnipoint (through its affiliate OPCSE), UTAM has never demonstrated its compliance with the Block C eligibility rules, 47 C.F.R. § 24.709, and it also has no status as a Block C or F licensee. While Omnipoint fully supports UTAM's status as a small-business entrepreneur for reimbursement purposes, there is no reason to exclude Omnipoint, or other similarly-situated pioneers, from those same benefits.

¹¹ See "FCC Announces Status of Applications to Participate in Auction of Broadband PCS C Block Licenses," at Attachment A, p. 46 (released November 20, 1995).


CONCLUSION

Omnipoint generally supports the proposed cost-allocation and sharing mechanisms set forth in the NPRM, with the modifications discussed above, and urges the Commission to act expeditiously on this matter.

Respectfully submitted,

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